IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

UNITED STATES EX REL. WALTER KRUEGER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM FOR THE RESPONDENT IN THE NATURE OF A CROSS-PETITION FOR A WRIT OF CERTIORARI.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Respondent.

JOHN C. MORRISON,
305 Morrison Building,
Charleston 24, W. Va.,

ADAM RICHMOND,
7816 Glenbrook Road,
Bethesda, Maryland,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 713

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, *Petitioner*,

v.

UNITED STATES EX REL. WALTER KRUEGER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM FOR THE RESPONDENT IN THE NATURE OF A CROSS-PETITION FOR A WRIT OF CERTIORARI.

Respondent joins the Solicitor General in praying that a writ of certiorari issue to review the above-entitled case.

The public importance of the constitutional question presented by the petition is obvious, and, since decision of that question depends on the scope of the doctrine of *Toth* v. *Quarles*, 350 U. S. 11, it is not likely that consideration thereof by Courts of Appeals in the several circuits, with, it may be, conflicting

rulings pending ultimate review here, is likely to result in clarification.

Nor are the parties in interest apt to reconsider their positions. Notwithstanding two decisions in the United States District Court for the District of Columbia invalidating military trials of civilians in time of peace (*United States ex rel. Covert* v. *Reid*, pending on appeal, No. 701 this Term (dependent wife); *Hurlahe* v. *Wilson*, Habeas Corpus No. 94-55, D. D. C., decided January 4, 1956 (civilian employee)), all three services have announced to the public that they will continue to try civilian dependents and employees by court-martial pending final decision by this Court as to the legality of such trials.[1] Such a threat of continued unconstitutional action plainly calls for an early determination of the basic question by this Court, and accordingly, as has been indicated, respondent joins in the prayer that a writ of certiorari be granted.

If respondent had prevailed in the district court, then, on familiar principles, he would be able to rely on any issue in the case to sustain the judgment below without specifically assigning it as error. "A respondent can support his judgment on any ground that appears in the record." *Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 134, note 3, and cases there cited. But respondent here is a respondent only formally; he is in fact assailing the judgment here, a circumstance that would appear to bring into play the countervailing principle that "A respondent * * * may not attack [a judgment] even on grounds asserted

[1] See Washington *Evening Star*, Nov. 30, 1955; *Washington Daily News*, Dec. 6, 1955; *The Navy Times*, December 10, 1955.

in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him." *Letulle* v. *Scofield*, 308 U. S. 415, 421-422.

No decision here, so far as respondent is aware, has ever considered the right of a nominal respondent, unsuccessful in the district court, to raise here, without the filing of a cross-petition, questions additional to those presented by the party who prevailed in the district court where such prevailing party's petition was granted prior to judgment in the court of appeals. In *United States* v. *United Mine Workers*, 330 U. S. 258, and again in *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, cross-petitions were in fact filed by the respondents and granted by this Court.

Accordingly, out of an abundance of caution, respondent files this memorandum in the nature of a cross-petition, so that, if the petition is granted, he may argue the following non-constitutional question that was duly raised in the district court (petition for habeas corpus, par. 13) and there decided against him (Pet. 11-13), viz.:

> Is a court-martial lawfully constituted when, being appointed by a Brigadier General, it includes a Major General as a member thereof?

This question has substance. According to Winthrop (1 *Military Law and Precedents* (2d ed. 1896) *54-55 [1920 reprint, pp. 49-50]), a court-martial is "a purely executive agency designed for military uses" that is "called into existence by a military order"; such order being (*id.* at *229 [reprint, p. 158]) "a direction to certain officers named to assemble at a certain time and place and form a court for the trial of a person

or persons specifically or in general terms indicated * * *." Granted that, over the years, a court-martial has come to be regarded as more and more of a court, it is still "called into existence by a military order." See *Manual for Courts-Martial, U. S., 1951*, ¶36*b*: "A court-martial is created by an appointing order issued by the convening authority."

That being so, a Brigadier General cannot issue an order to a Major General, whose rank is one grade higher by statute (R. S. § 1466, 34 U. S. C. § 241), nor can the Major General be directed by the common superior of both to take orders from a subordinate who is acting, as a convening authority must, in his own name; to do so would violate the hierarchy of rank prescribed by the statute. (There are qualifications which are not relevant in the present case, and so need not be considered at this juncture.) The basic rule must be viewed against two other propositions, first, that the appointment of a court-martial is still an attribute of command which devolves with command (*United States* v. *Bunting*, 4 USCMA 84, 15 CMR 84; *United States* v. *Williams*, 6 USCMA 243, 19 CMR 369); and, second, that the improper composition of a court-martial is a point that is never waived and so may be asserted collaterally at any time. *McClaughry* v. *Deming*, 186 U. S. 49, 66-70.[2] It fol-

[2] *Swaim* v. *United States*, 165 U. S. 553, relied on by the District judge (Pet. 13), is wide of the mark, as the statute there was directory only, and contained a discretionary clause, viz., "when it can be avoided". The same was true in other military law cases that turned on similar directory statutes. *Hiatt* v. *Brown*, 339 U. S. 103 ("available for the purpose"); *Kahn* v. *Anderson*, 255 U. S. 1 ("without manifest injury to the service"); *Mullan* v. *United States*, 140 U. S. 240 (same). Here, however the appointing authority was given no discretion whatever to issue an order to an officer senior to himself.

lows that, in the present case, the court-martial was convened by an order illegal on its face, with the result that its proceedings were, and here must be held to have been, absolutely void.

None the less, the constitutional issue still looms large, as a reversal on the sole ground that the court-martial was improperly constituted would still leave the petitioner free to assert, as the appellant in *Covert v. Reid*, No. 701 this Term, is presently urging, that such reversal does not deprive the respective armed force of power to retry a dependent wife by court-martial, even in the United States.

Accordingly, respondent prays that the writ of certiorari be granted in this case in respect both of the question presented by the Solicitor General and of the question presented here.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Respondent.

JOHN C. MORRISON,
305 Morrison Building,
Charleston 24, W. Va.,

ADAM RICHMOND,
7816 Glenbrook Road,
Bethesda, Maryland,
Of Counsel.

FEBRUARY 1956.